ATTORNEYS

Appeal of Mishandled Case Doesn't Toll Statute of Limitations for Malpractice

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JERI EMMET LAIRD,
Plaintiff-Respondent,
v.
SIDNEY G. BLACKER, As Administrator, etc., et al.,
Defendants-Appellants.

No. B 037429
Super.Ct. No. C 453404
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION ONE

FILED APRIL 10, 1991

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Lopez, Judge. Reversed and remanded with directions.

Horvitz & Levy, Ellis J. Horvitz, and Frederic D. Cohen, for defendants and Appellants.

Francis C. Pizzulli, for Plaintiff and Respondent.

We are asked in this case to decide whether the pendency of an appeal from an adverse judgment tolls the statute of limitations in a subsequent legal malpractice action against the attorney whose wrongful conduct was the cause of the adverse judgment. We hold that it does not.

FACTS

The relevant facts are not disputed. On March 8, 1977, Jeri Emmet Laird, a television writer, sued Spelling-

Goldberg, a television production company, claiming that her story ideas and characters had been plagiarized by Spelling-Goldberg and developed into the television series "Family." Laird's complaint was not filed in propria persona.

In May 1977, Laird retained Berg & Spire to prosecute her lawsuit. In three years,the only thing that firm did was to effectuate service of the complaint.

During the Summer of 1980, Laird retained Barry Post and the Law Offices of Samuel Z. Winnikoff's office filed an at-issue memorandum, served interrogatories on Spelling-Goldberg and scheduled Aaron Spelling's deposition.

In August 1981, Spelling-Goldberg filed a motion to dismiss Laird's case for want of prosecution. On October 20, 1981, the trial court granted the motion

and an order of dismissal was filed. Laird could not afford the $4,000 Post requested to pursue an appeal from the dismissal and on December 7, 1981, she discharged Post and Winnikoff, substituted herself in propria persona, and filed a notice of appeal. On September 15, 1982, Laird settled her claims against Spelling-Goldberg for $1,000 and dismissed her appeal.

On May 17, 1983, nineteen months after her action against Spelling-Goldberg was dismissed and seventeen months after Post and Winnikoff were discharged, but only eight months after she dismissed her appeal from the order of dismissal, Laird sued Berg & Spire and Barry Post for legal malpractice. In February 1986, Laird amended her complaint to add Samuel Z. Winnikoff as

an additional defendant.[1]

In January 1987, Laird filed a second amended complaint. Post and Winnikoff demurred, asserting that Laird's cause of action had accrued on October 20, 1981 (the date her underlying case was dismissed), that the statute of limitations started running on

[1] By that time, Winnikoff had died, Laird actually named Winnikoff's law practice as "Doe 1," and Sidney Black, administrator of Winnikoff's estate, as "Doe 2." For brevity and clarity, we refer to these defendants jointly as "Winnikoff."

December 7, 1981 (the date Laird discharged Post and Winnikoff)[2] and that Laird's action was therefore barred by the applicable statute of limitations, section 340.6. Laird opposed the demurrers, asserting that her cause of action had not accrued until she dismissed her appeal on September 15, 1982. The trial court overruled the demurrers.

Laird settled with Berg & Spire for $50,000 and proceeded to trial against Post and Winnikoff. Posts' and Winnikoff's motions for nonsuit on

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[2] There is no issue in this case concerning subdivision (a)(2) of section 340.6 of the Code of Civil Procedure, which tolls the statute of limitations during the time an allegedly negligent attorney continues to represent the client.

Unless otherwise noted, all section references are to be Code of Civil Procedure.

statute of limitations grounds were denied and the jury returned a verdict in favor of Laird for approximately $1.7 million. Post's and Winnikoff's motions for judgment notwithstanding the verdict, once again asserting the bar of limitations, were denied and this appeal followed. We reverse, concluding that, as a matter of law, Laird's claims against her former attorneys were barred limitations.

DISCUSSION

I.

In broad terms, the rule today is that the statute of limitations for a cause of action for legal malpractice does not accrue until the client suffers damage and discovers, or should discover, the facts essential to his or her claim, whichever occurs later. As will appear, it is the application of this rule

of this rule and not its articulation which poses the problem. We therefore begin our discussion by examining the origin of the rule and the manner in which it has been applied.

A.
THE OCCURRENCE RULE

In Hays v. Ewing (1886) 70 Cal. 127, the plaintiff filed suit in 1884, alleging that his attorney's negligence had resulted in the dismissal of his collection suit in November 1881. Our Supreme Court held that the malpractice action was barred by the two-year limitations period of former section 339.

Eighty-five years later, in Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, the Supreme Court explained what happened when Hays got into the hands of the publisher. "Since the dismissal in the collection suit

occurred two and one-half years before the institution of the malpractice action, clearly the two-year limitation of section 339 barred any cause of action based on negligent conduct which occurred prior to the dismissal. Obviously this court accepted the date of dismissal of the suit -- that is, the date upon which the client suffered damage -- as the crucial point from which the statute of limitations should run. Indeed, the court refused to adopt as the critical time the date of the affirmance of the dismissal on appeal. Nevertheless, the publisher's headnote summarized the holding as follows: 'a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after neglect occurred'... We search in vain within the body of the opinion or within the facts

of the case for any justification for the publisher's note. Yet this unwarranted headnote generated the peculiar rule that only in legal malpractice cases does the statute of limitations begin to run before damage and before discovery." (Id. at p. 183, first emphasis added.)[3]

B.
THE "IRREMEDIABLE DAMAGE" RULE

The occurrence rule was on the back burner between 1886 and 1935 (there were

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[3] The publisher's condition appears to have been contagious. Contrary to the statement in Neel, the court in did not refuse "to adopt as the critical time the date of the affirmance of the dismissal on appeal." It never got that far. What the court said was that "[t]he complaint herein avers that the plaintiff, subsequent to and within one year after the judgment in [the underlying case], demanded of the defendant herein that he should take an appeal on behalf of the plaintiff in that action. [ ] But the facts stated in this complaint show that an appeal would have been of no avail. [ ] Judgment affirmed." Hays v. Ewing, supra 70 Cal. at p. 128; emphasis added.)

only five cases discussing the problem for almost 50 years)[4] and then off the stove altogether for the next 29 years, during which time there were no published appellate decisions discussing the period of limitations for legal malpractice. During that same time, however, the courts held that in medical malpractice actions the period of limitations does not begin until discovery, and the discovery rule was then extended to other professions.

In legal malpractice actions, our courts nevertheless adhered to the occurrence rule, consistently holding (without apology or analysis) that the

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[4] Hays v. Ewing, supra 70 Cal.127; Lally v. Kuster (1918) 177 Cal.783; Jensen v. Sprigg (1927) 84 Cal.App 519; Wheaton v. Nolan (1934) 3 Cal.App.2d 401; and DeGarmo v. Luther T. Mayo, Inc. (1935) 4 Cal.App.2d 604.

statute ran not from the date of discovery but from the date the negligent act occurred, notwithstanding that claims were sometimes lost before their existence was known. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra 6 Cal.3d at p. 185; see also Griffith v. Zavlaris (1963) 215 Cal.App.2d 826; Yandell v. Baker (1968) 258 Cal.App.2d 308; Alter v. Michael (1966) 64 Cal.2d 480.)

The problem created by the occurrence rule first received serious attention in Heyer v. Flaig (1969) 70 Cal.2d 223. In Heyer, Doria Kilburn retained Joseph Flaig to prepare her will and instructed Flaig that her entire estate was to pass to her two daughters. She also told Flaig that she was about to be married. Flaig prepared a will and Kilburn executed it on December 21, 1962.

On December 31, 1962, she was married. The will left everything to Kilburn's daughters but failed to mention Kilburn's new husband. Id. at p. 225.)

On July 9, 1963, Kilburn died. Her husband claimed a portion of the estate, asserting that he was a post-testamentary spouse. At some point after December 21, 1964, Kilburn's daughters sued Flaig, alleging he had negligently failed to advise their mother of the consequences of a post-testamentary marriage and, subsequent to Kilburn's marriage and up to the time of her death, negligently failed to advise her of the consequences of omitting from the will any mention of her husband's inevitable claim. (Id. at pp. 225-226.)

Flaig's demurrer was sustained without leave to amend, on the ground that the action was filed more than two

years after the commission of the negligent act (the drafting of the will). The Supreme Court reversed, holding that Flaig's duty to Kilburn's daughters extended "beyond the date of the original drafting of the will when the attorney's negligent acts created a defective estate plan upon which the client might rely until her death. The duty effectively to fulfill the desired testamentary scheme continued until [Kilburn's] death, when [Kilbrun's] reliance became irrevocable. Because [Flaig] owed [the daughters] this continuing duty the cause of action did not accrue nor the statute of limitations commence to run until [Flaig's] negligence became irremediable."[5] (Id. at p. 230; emphasis added.)

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[5] This was the Supreme Court's first step into the minefield of "irrevocable" and "irremediable" damage, and the origin of the problem we address in this case.

The result is not surprising since adoption of any other rule in Heyer would have meant that the only beneficiary who could recover "would be one whose testator had died and who could file a complaint prior to two years after the drafting of the will or after the occurrence of some other original negligent act." (Id. at p. 231.) The court refused to adopt this "absurd proposition," notwithstanding that, at the time Heyer was decided, the occurrence rule would have barred an action by Kilburn against Flaig had she lived and discovered the problem at

the time her daughters filed suit.[6] (Id. at pp. 231-233.)

C.

THE RULES OF "DISCOVERY" AND "APPRECIABLE DAMAGE"

In Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra 6 Cal.3d 176, 179, the Supreme Court corrected the publisher's error in Hays v. Ewing, holding that the statute of limitations for legal malpractice, as for all professional malpractice, starts to run when the client discovers, or should

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[6] In 1977, section 340.6 was adopted as California's first statute of limitations drafted expressly to apply to legal malpractice actions (See Part III, post.) Subdivisions (b) of section 340.6 addresses the Heyer v. Flaig problem: "In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event."

reasonably discover, his cause of action. In the companion case of Budd v. Nixen (1971) 6 Cal.3d 195, 198, the Supreme Court held that a cause of action for legal malpractice does not accrue until the client suffers damage. Read together, Neel and Budd hold that the statute of limitations for a cause of action for legal malpractice does not accrue until the client suffers damage and discovers, or should discover, the facts essential to his or her claim, whichever occurs later.[7]

In Neel, the Supreme Court recognized that adoption of a "date of discovery rule" would impose an increased

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[7] The date of discovery is not an issue in this case. Laird was in court when her case was dismissed and she believed as of that date that Post and Winnikoff had negligently handled her case.

burden on the legal profession because the attorney's error might not "work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect. On the other hand, when an attorney raises the statute of limitations to occlude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of the action not only starkly works an injustice upon the client but partially impugns the very integrity of the legal profession."[8] (Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra, 6 Cal.3d at p. 192)

In Budd v. Nixen supra, 6 Cal.3d

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[8] The Court recommended and the Legislature ultimately adopted an outside limit on liability. (Id. at pp. 192-193; section 340.6, subd. (a).

194, 199, the Supreme Court "deal[t] with a situation in which the client contends that although he discovered his attorney's negligence, he had not, at that time, suffered consequential damages; hence, at that date he did not have an accrued cause of action for professional negligence." Budd holds that if the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. "Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice... ~It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred"... [ ] The cause of action arises, however, before the client sustains all, or even

the greater part, of the damages occasioned by his attorney's negligence. [Citations.] Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue. [ ] Indeed, once having discovered his attorney's negligence and having suffered some damage, the client must institute his action within the time prescribed in the statute of limitations or he will be barred from thereafter complaining of his attorney's conduct." (Id. at pp. 200-201, emphasis added.)

The Court explained that this issue would arise only in unusual cases: "Ordinarily, the client has already suffered damage when he discovers his attorney's negligence, as occurred in Neel... In other cases, the infliction of the damage will alert the client to the

attorney's negligence and thus the statute of limitations will then begin to run on any malpractice action. Only in the unusual case will the client discover his attorney's negligence without having suffered any consequential damage." (Id. at p. 201.)

Addressing the particular facts of the case before it -- where the plaintiff in the malpractice action was a defendant in the underlying case who suffered an adverse money judgment against him and who might or might not incur attorney's fees on appeal from that judgment, the Supreme Court concluded that even if Budd's malpractice action "had not earlier accrued, it at least matured on entry of judgment because he clearly then became obligated to pay a considerable sum to the broker to post a bond on appeal." (Id. at p. 202.)

Taken at face value, this language supports a conclusion that an appeal does not extend the period of limitations, at least in the factual context of Budd. Where, however, the malpractice occurs in the course of representing a plaintiff, there is no risk of execution and not need to post a bond. There may or may not be attorney's fees incurred lost interest or other expenses.

In our view, the timeliness of a legal malpractice action ought not to turn on whether the client happened to be a plaintiff or a defendant in the underlying action. We believe the Supreme Court at least implicitly agreed and recognized that adoption of the discovery rule eliminated the Heyer requirement of "irremediable" damage since Budd speaks only of "appreciable harm" and neither

Budd nor Neel use the word "irremediable." As we explain in Part III, post, we believe the Legislature similarly agreed and drafted section 340.6 consistent with this view. But before we review the legislative history of section 340.6, we jump ahead to examine the cases decided after adoption of the statute, if for no other reason than to demonstrate the inconsistencies in those decisions and the reason for our departure from the accepted approach to this problem.

II.
THE CASES DECIDED AFTER ENACTMENT OF SECTION 340.6

In 1977, the Legislature enacted section 340.6. (Stats. 1977, ch. 863, section 1.) Then and now, subdivision (a)(1) of section 340.6 provides that "[a]n action against an attorney [for

malpractice] shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the [malpractice], or four years from the [malpractice], whichever occurs first[,]...except...the period [for commencement of legal action] shall be tolled during the time that... [t]he plaintiff has not sustained actual injury..."[9]

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[9] Section 340.6, in its entirety, provides that:

"(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

"(1) The plaintiff has not sustained actual injury:

Several years went by before the courts were called upon to examine section 340.6 in a context relevant to the issue now before us. In the first case, Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal.App.3d 417, 432, the Fourth District assumed the "irremediable" rule of Heyer had to be

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"(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

"(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney; except that this subdivision shall toll only the four-year limitation; and

"(4) The plaintiff is under legal or physical disability which restricts the plaintiff's ability to commence legal action.

"(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

read into the word "actual" in subdivision (a)(1) of section 340.6.

In a malpractice action by a client who was a plaintiff in an action to recover payment for construction work. Southland holds that "[a] client suffers damage when he is compelled, as a result of the attorney's error, to incur and pay attorney's fees and legal costs and expenditures.) Budd v. Nixes, supra, 6 Cal.3d 195, 201.) The statute of limitations commences to run when a cause of action accrues, i.e., when the error becomes irremediable and the impact of the injury occurs. (Heyer v. Flaig (1969) 70 Cal.2d 223, 225...) (Southland Mechanical Constructors Corp. v. Nixen,

supra, 119 Cal.App.3d at pp.432, emphasis added.)[10]

In the next case, Bell v. Hummel (1982) 136 Cal.App.3d 1009, Division Three of our District held that "[e]ven after knowing of a wrongful act, if there is not actual irremediable damage, there is no running of the statute of limitations... [ ] ...It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises. It is sufficient if [a]ny appreciable and actual harm flowing from

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[10] Southland holds that in an action by a subcontractor against its attorney for failing to pursue a claim against the government which had been assigned to the subcontractor by the general contractor, the statute of limitations starts to run when, by failing to pursue an appeal, the subcontractor lost its rights against the government, and that the statute was not tolled while the subcontractor continued to pursue its remedy against the general contractor.

the attorney's negligent conduct' has occurred"[11] (Id. at p. 1016, emphasis added.)

In the third case, Robinson v. McGinn (1987) 195 Cal.App.3d 66, 72, Division Seven of our District held that harm does not become "irremediable" until the client has exhausted his administrative remedies. According to Robinson, "the statute of limitations on a legal malpractice action does not begin to run until the lawyer's negligence which caused the harm becomes irremediable." (Id. at p. 73, emphasis added.) More specifically, "harm is

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[11] Bell holds that a trial court order denying a husband's motion to join with his wife as a plaintiff in a medical malpractice case is actual damage to the husband and starts the statute running as to his subsequent legal malpractice claim against the attorney who failed to include him as a plaintiff in the first instance.

'actual and appreciable' only if and when it becomes 'irremediable' [and] 'irremediable,' by definition means something which is impossible to remedy; something which is lost or incorrigible."[12] (Id. at p. 74, emphasis added.)

In the fourth and most recent case, Troche v. Daley (1990) 217 Cal.App.3d 403, the Fourth District upheld a summary judgment granted on statute of limitations grounds. The facts are strikingly similar to those in the case before us. Brandy Troche filed a lawsuit in federal district court. That action was dismissed on May 15, 1984, for

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[12] Robinson holds that an administrative appeal from a public entity's decision to terminate an employee tolls the statute of limitations in a legal malpractice action against the attorney whose negligent advice resulted in the employee's termination.

failure to timely serve a defendant, and on June 28, 1984, Troche filed a notice of appeal. On March 1985, the federal court denied Troche's request to appeal in forma pauperis because the court was unable to certify the appeal as not frivolous. On August 26, 1985, Troche sued her former attorney. (Id. at p. 406.)

The court framed the issue, and answer thus: "[When did Troche suffer actual harm: Was it May 15, 1984, when the federal suit was dismissed or was it, as Troche argues, March 18, 1985, when the district court denied Troche's request to appeal in forma pauperis? ... [ ] We find the harm occurred on May 15, 1984, when the district court dismissed the lawsuit. While [the attorney's] alleged negligence occurred in 1981 -- when he failed to serve the appropriate

federal entities -- Troche did not suffer injury from that negligence until her lawsuit was dismissed."[13] (Id. at p. 410.)

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[13] (See also Ruchti v. Goldfein (1980) 113 Cal.App.3d 928, 935 [holding that a client whose attorney permitted a judgment dissolving her marriage to be entered without protecting her interest in her husband's military pension was damaged when the judgment in the dissolution proceeding became final, not at the later date on which the husband's right to receive the pension vested]; Bledstein v. Superior Court (1984) 162 Cal.App.3d 152, 170 [stating the rule as "appreciable harm"] Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1164 [appreciable and actual damage"]; Goebel v. Lauderdale (1989) 214 Cal.App.3d 1502, 1507 ["irremediable harm"], McKeown v. First Interstate Bank (1987) 194 Cal.App.3d 1225, 1231 ["irremediable error"]; Johnson v. Haberman & Kassoy (1988) 201 Cal.App.3d 1468, 1474 ["irremediable" harm]; In re Easterbrook (1988) 200 Cal.App.3d 1541, 1544 ["appreciable and actual harm"].)

These cases illustrate the problem in fixing an accrual date in situations where further trial court motions or an appeal are pursued, notwithstanding that the injury does not temporarily disappear or become suspended because a more final adjudication of the result is sought. (Richards Enterprises, Inc. v. Swofford (Fla. 1986) 495 So.2d 1210, 1216 (dis. opn. of Cowart, J.) ["Appellate review in civil cases can correct judicial error, but an appeal does not eliminate a trial lawyer's negligence nor does it extinguish a client's cause of action against an attorney for negligence in the conduct of a trial" 1;see also 2 Mallen & Smith, Legal Malpractice (3d ed. 1989) section 18.11, p. 111.) They also illustrate the problem the Legislature thought it solved with the adoption of section 340.6.

III.
FAREWELL TO THE CONCEPT OF "IRREMEDIABLE"

When the Legislature adopted section 340.6 in 1977, it codified the discovery rule of Neel and the "actual" damage rule of Budd (but not Budd's "appreciable harm" standard) and implicitly rejected the "irremediable" rule of Heyer. Unfortunately, the Courts of Appeal have adhered with the tenacity of Velcro to the idea that the damage incurred must in every case be "irremediable" before the statute starts to run. In our view, the correct analysis compels a different approach.

A
THE LEGISLATURE KNEW ABOUT HEYER, NEEL AND BUDD

Heyer was decided in 1969, at which time the occurrence rule was alive and well and required that a legal malpractice action be file within two

years following the negligent act. To prevent a manifest injustice in the case of a testator who did not die within two years after the negligent act, the Supreme Court adopted the "irremediable" rule, holding that the period of limitations did not start to run until the date on which it was no longer possible to correct the negligent act. Death of a testator is the ultimate example of irremediable injury.

Neel and Budd were decided in 1971. Neel abolished the occurrence rule and adopted the discovery rule, thereby eliminating the problem the court had faced two years earlier in Heyer. Budd addressed the situation where the client discovered the attorney's negligence but had not, at the time of that discovery, suffered "consequential damages, and held that a claim based on an attorney's

negligence does not accrue until the client suffers "appreciable harm as a consequence of his attorney's negligence." (Budd v. Nixen, supra 6 Cal.3d at p. 200.) The word "irremediable" does not appear in to the contrary, Budd holds that "[t]he cause of action [for legal malpractice] arises... before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence... Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue." (Id. at p. 201.)

Clearly, the Supreme Court recognized that adoption of the discovery rule eliminated the reason for the "irremediable" rule. Application of the discovery rule to shows that there is no

reason to consider when the injury caused by Flaig's negligence became irremediable -- because Kilburn's daughters would not have discovered the negligence until after their mother died, their cause of action would not have arisen until the date of discovery and the statute would have run from that date. although Legislature apparently understood this analysis, it has not been considered by the courts since the enactment of section 340.6.[14]

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[14] See 2 Mallen & Smith, Legal Malpractice, section 18.11, pp. 110-111: "Some decisions erroneously have rationalized tolling a statute of limitations because of lack of damage.' Usually, the more appropriate analysis concerns the inability of the client to discover either the attorney's negligence or its consequences. Such decisions are a reaction to the unfairness of the occurrence rule and are unnecessary in a discovery rule jurisdiction." (Emphasis added.)

B.
ASSEMBLY BILL NO. 3068

On February 13, 1976, Assembly No. 3068 was introduced by Assemblyman Brown, to add a new section 340.6. It was short and sweet: "In any action for damages against an attorney based upon the attorney's alleged professional negligence, the time for the commencement of action shall be three years after the date of the negligent act or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the damage, whichever first occurs. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (a) upon proof of fraud; or (b) intentional concealment." By the end of the year, Assembly Bill No. 3068 was withdrawn without formal action.

(I)Assem. J. (1975-1976 Reg. Sess.) p. 21862.)

C.
THE MALLEN PROPOSAL

In early 1977, Ronald E. Mallen, who is perhaps the preeminent expert on the subject of legal malpractice, published an article entitled Panacea or Pandora's Box? A Statute of Limitations for Lawyers (52 Cal.State Bar J. 22), proposing a statute to address the legal malpractice insurance crises evidenced by the "enormous increase of insurance premiums...accompanied by a dramatic decline in the number of companies willing to insure attorneys." (Id. at p. 22.) His statute, he hoped, would achieve the dual goals of (1) limiting liability in legal malpractice cases while at the same time (2) maintaining the integrity of the attorney-client relationship. (Id.

at p. 24.) His draft reflects the skeleton of what ultimately became section 340.6:

"An action against an attorney for a wrongful act of omission, other than for actual fraud or breach of a written contract, arising in the performance of a professional services shall be commenced within two years from the date the plaintiff discovers or through the sue of reasonable diligence, should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. [ ]The accrual of the cause of action shall be tolled for the time druing which any for the following subsist: [ ] 1.The plaintiff has not sustained significant injury; [ ] 2. The attorney continues to represent the plaintiff regarding the

specific subject matter in which the alleged wrongful act or omission occurred; [ ] 3. The attorney wilfully fails to disclose the facts constituting the wrongful act or omission when such fact are known to the attorney, except that this subdivision shall toll only the four-year limitation." (**Id.** at p. 24, emphasis added.)

Mr. Mallen explained that the tolling provisions "are important not only for the client but also for the attorney and the judicial process. Thus, the plaintiff should not be required to sue until he sustains significant damage. To do otherwise is to outlaw causes of action before remedies may exist or to promote unnecessary litigation." (**Ibid.**) In footnotes to these comments, Mr. Mallen cites **Budd** for the proposition that the client should not have to sue

until he sustains "significant damage" and Heyer to explain that it "would be unfair to cut off a cause of actin by a statute of limitations before a remedy existed." (Id. at p. 24, fns. 16, 17.)

D.
ASSEMBLY BILL NO. 298

On January 25, 1977, Assembly Bill No. 298 was introduced by Assemblyman Brown, to add a new section 340.6.15. As originally drafted, Assembly Bill No. 298 changed the period of limitations to "three years after the date of the negligent act or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the damage, whichever first occurs. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud; or

(2) intentional concealment."

Noticeably absent was any reference to the existence of injury, actual, appreciable, significant or otherwise. The bill did include two other interesting provisions: "(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event. [ ] (c) Any decrease in cost to an insurer resulting from the effect of the enactment of this section in insuring against professional negligence shall be passed on the individuals insured against professional negligence."

Subdivision (b) was obviously intended to address the testamentary problem of Heyer and similar problems in

contingent contracts. Subdivision (c) was obviously the product of someone's daydream. Sometime after the original bill was introduced and prior to its first amendment, the author of Assembly Bill No. 298 obtained and considered Mr. Mallen's article and proposed statute.[16]

Although the pass-through of insurance costs might have been unrealistic (see, e.g., Report of the Senate Committee on Judiciary on Assem. Bill No. 298, as amended May 17, 1977, p. 4 [HOW IS THIS PROVISION TO BE ENFORCED?"]), the more pragmatic and overriding purpose of the bill was "to reduce the costs of legal malpractice insurance." (Id. at p. 1; see also

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[16] A Bill Digest prepared by the Assembly Committee on Judiciary for a March 24, 1977, hearing date refers to prior distribution to the Committee of Mr. Mallen's article. (See Honey Spring Homeowners Assn. v. Board of Supervisors

Assenbly Brown's "Fact Sheet" re Assem. Bill No. 298, March 25, 1977 (noting that the bill would hopefully make malpractice insurance easier to obtain and also reduce and thus stabilize fees]; and see Southland Mechanical Constructors Corp. v. Nixen, supra, 119 Cal.App.3d at p. 429.)[17]

Assembly Bill No. 298 was amended in the Assembly on May 9, 1977, by a complete rewrite of subdivision (a): "An action against any attorney for a

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(1984) 157 Cal.App.3d 1122, 1136-1137; Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.App.ed 211, 219.)

[17] In the article accompanying his proposed statute, Mr. Mallen explained: "Legal malpractice is a subject of increasing concern to attorneys. Although the most direct exposure is being named as a defendant, almost equally disturbing is the annual experience of renewing professional liability insurance... The enormous increase of insurance premiums has been accompanied by a dramatic decline in the number of companies

wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years unless tolled during the time that any of the following exist: [ ] (1) The plaintiff

has not sustained significant injury;[18] [ ] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [ ] (3) The attorney willfully fails to disclose the facts constituting the wrongful act of omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitations; and [ ] (4) When circumstances beyond the plaintiff's control, such as incarceration or confinement to a mental facility, exist." Subdivisions (b) and (c) remained unchanged.

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willing to insure attorneys." (Mallen, Panacea or Pandora's Box? A Statute of Limitations for Lawyers (1977) 52 Cal.State Bar J 22.)

[18] Clearly, the word "significant" came from Mr. Mallen's proposed statute.

On May 17, 1977, Assembly Bill No. 298 was again amended in the Assembly. Aside from stylistic changes, the only meaningful amendment was to subdivision (a)(1) by deleting "significant" and substituting "actual" so that the four-year period would be tolled when the plaintiff "has not sustained actual injury." The only other change was to subdivision (a)(4), to provide that the

statute would be tolled when the "plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

The final amendment to Assembly Bill No. 298 was by the Senate on August 17, 1977, the inevitable deletion of the insurance savings pass-through of subdivision (c). The bill was thereafter

passed by the Senate and the Assembly, approved by the Governor, and chaptered (Stats. 1977, ch. 863.)

Subdivision (b) was not a part of Mr. Mallen's proposed statute. To us, it appears that the Legislature included subdivision (b) to prevent the Heyer problem and thereby eliminated the "significant" requirement of Mr. Mallen's proposed statute. By providing that the period of limitations does not start running until the future event occurs when he action is based upon an instrument in writing contingent upon a future act or event, the Legislature ensured that the attorney who negligently drafts a will or a contract cannot escape liability in the fortuitous event that the contingent act occur' outside the period of limitations. It follows that

"significant" was not needed in subdivision (a)(1) and that it was deleted to avoid a construction that would reincorporate the old "irremediable" standard.

E.
WELCOME TO "ACTUAL INJURY"

The next question, therefore, is what is "actual" injury? We know what it is not -- it need not be "irremediable" to be actual, nor need it be "significant" to be actual. It follows that in this context, "actual" means objectively existing and not feigned or merely speculative, real and not imagined. (See Black's Law Dict. (5th ed. 1979) p. 33.) To us, this means that the injury must be objectively verifiable and not dependent upon the subjective description of the injured person. Asked differently, the question is whether we

can say that, as of the relevant date, a reasonable person would have considered the injury to be real.[19]

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[19] See 2 Mallen & Smith, Legal Malpractice, supra, section 18.11, pages 103, 105. "The damage rule ameliorates much of the unfairness of the occurrence rule. Unfortunately, the cure does have some side effects in creating uncertainties regarding the existence and date of damage. Those uncertainties may require the attorney defendant to bear the full expense and strain of an unwarranted trial. [ ] ...[In the drafting of section 340.6, California] addressed the issue of the amount.' of damage necessary to commence accrual of the statute. In the legislative proposal, the 'appreciable and actual' test of Budd v. Nixen was replaced by 'significant' injury, but the final statutory enactment required only 'actual damage. The change was motivated by pragmatic reasons rather than favoritism for lawyers. For statute of limitations to effectively preclude litigation of stale claims, the inquiry of damage should not invariably raise an issue of fact subjecting the lawyer to uncertainty and the expense of litigating both the merits of the claim and statute defense... The California approach reduces the hazard of its statute creating factual issues for litigation by focusing upon the damage rather than upon the amount." (First emphasis added.)

To attempt to quantify damage or injury pending an appeal necessarily results in a distinction between plaintiffs and defendants and a contest about whether a particular expenditure is sufficient to trigger the limitations period. For example, a defendant who suffers an adverse judgment because of an attorney's wrongful act or omission will usually be forced either to pay the judgment or post a bond pending appeal, and attorney's fees and costs will probably be incurred. But what if the client's assets are safe from execution and no bond is posted? What if the attorney does not charge for the appeal (a possibility that is not remote if the attorney hopes to correct his own mistake)? What about a plaintiff? If the underlying case was one the attorney undertook on a contingent basis, the

attorney may be obligated to pursue the appeal on the same basis and also to advance costs. If the client (plaintiff or defendant) advances the costs necessary for preparation of the record on appeal, is that enough? What amount of fees or costs is enough?

To avoid these and similar philosophical debates about the decibel level of trees falling in unpopulated forests, the Legislature used "actual" to focus the fact of damage and eliminated all qualifiers to prevent consideration of the amount of damage.

F.

ACTUAL INJURY OCCURS UPON ENTRY OF AN ADVERSE JUDGMENT OR FINAL ORDER IN THE TRIAL COURT AND AN APPEAL DOES NOT DEFER THE DATE OF ACCRUAL

In our view, an interpretation of section 340.6 which requires an artificial distinction based on pure happen-stance is contrary to both common

sense and the intent of the Legislature. We believe the Legislature used "actual" injury intentionally, and deviated from "irremediable" and "significant" to provide a more certain test of damages than the prior court-adopted criterion. Stated otherwise, the Legislature rejected the inquiry mandated by Budd, which focused on the extent rather than the fact of damage, and fashioned a statute which focuses instead "on whether the [client] sustained any detectable damage," emphasizing the fact of damage rather than its extent. (Mallen An Examination of a Statute of Limitations

for Lawyers (1978) 53 Cal.State Bar J.166167.)[20]

Loss at the trial level -- by entry of judgment or final order of dismissal -- is very real to the losing party. Notwithstanding that a subsequent appeal might afford the client a second bite at the apple, a plaintiff's loss of the right to recover and a defendant's sufferance of entry of an adverse judgment are equally real and not imagined, objectively existing conditions which are neither feigned nor merely speculative. (Neel v. Magana, Olney,

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[20] See also Davis v. Krasna (1975) 14 Cal.3d 502, 513-514 [holding that it is uncertainty as to the "fact of damage, rather than its amount, which negatives the existence of a cause of action" and that although a right to recover nominal damages will not trigger the statute of limitations, "the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period"].

Levy, Cathcart & Gelfand, supra 6 Cal.3d at p. 183 [approving Hays v. Ewing, supra, 70 Cal. 127, insofar as it accepted as "the date upon which the client suffered damage" the date on which the client's action was dismissed]; see also Rubinstein v. Barnes (1987) 195 Cal.App.3d 276, 281.) Considered in the proper context where the client has or should have discovered and therefore knows that the loss is the result of the attorney's wrongful act of omission -- there is no policy or practical reason to toll the statute of limitations beyond this date.[21]

First, if the discovery element is

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[21] See also Mallen & Smith, Legal Malpractice, supra, section 18.11, pages 111-112. When an appeal is taken from an adverse judgment, "an injury does not disappear or become suspended because of a more final adjudication of the result is sought."

missing or if the attorney continues to represent the client, the statute is tolled for different reasons. It is only the relatively unusual case where (1) a client knows (or should know) that the trial court loss was caused by the attorney, and (2) the attorney-client relationship is terminated but (3) the client nevertheless fails to file suit against the attorney within the statutory period that limitations will be a bar.

Second the slight inconvenience of filing the malpractice action in those few instances where a subsequent appeal from the underlying judgment might resurrect the client's case is not a sufficient reason to toll indefinitely the time within which suit may be filed when an appeal is pursued. The purpose of the statute would not be served if an attorney is kept in a state of breathless

apprehension while a former client pursues appeals from the trial court, to the Court of Appeal, to the Supreme Court and then, if the client has the money and energy, to the United States Supreme Court, during which time memories fade, witnesses disappear or die, and evidence is lost)Feldman v. Granger (1969) 255 Md.288, 257 A.2d 421,425.)

Robinson v. McGinn, supra, 195 Cal.App.3d at pp. 77-78, suggests that considerations of court congestion should outweigh the public policy underpinnings of section 340.6. We disagree. Visions of judicial gridlock cannot color our perception of legislative intent and the temptation to reach a different result is nil where, as here, we see only the usual

floodgates argument, devoid of substance.[22]

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[22] According to Robinson, the rule we adopt today will "further burden our existing overly crowded court calendars with the filing of potentially meritless lawsuits by [clients] waiting to learn whether they indeed will be suffering irremediable harm." (Id. at p. 77.) First, Robinson mistakenly assumes the continuing viability of "irremediable." Second, Robinson also implicitly assumes a volume of cases in this category that is not apparent from the number of published opinions on this point (or from any other source available to us). Third, Robinson ignores the fact that the same attorney may represent the client on the appeal, thereby tolling the statute for a different reason. 340.6 subd. (a)(2).) Fourth, Robinson fails to consider the possibility that an attorney might stipulate to extend the period of limitations until all appeals are concluded. Fifth, Robinson ignores the fact that since most appeals result in affirmance, deferral of the malpractice action is a postponement, not an avoidance. Like death and taxes, the malpractice suit is inevitable where the appeal is lost or where reversal on

We similarly reject the suggestion that commencement of a malpractice action prior to resolution of an appeal in the underlying case will intrude into the attorney-client relationship or pose a threat of inconsistent judgments. In the face of either concern, the malpractice action can by stayed. (Knight v. Furlow (D.C. 1989) 553 A.2d 1232, 1236 ["The fact that not all of a client's damages are finally ascertainable pending the outcome of an appeal may suggest in some circumstances that trial of the malpractice action should be stayed

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appeal does not make the client whole (e.g. Cooper v. State Bar (1987) 43 Cal.3d 1016, 1030 fn. 8 [delayed resolution of a dispute may in itself cause prejudice].) We are in any event satisfied that the particular policy considerations attendant to section 340.6 differ from the general policies emphasized by Robinson. See also footnoted 23, infra.

pending the appeal; it does not indicate that the client has not been injured earlier"].)

Another problem with a less absolute rule is that it necessarily precludes early resolution of a limitations defense in legal malpractice actions. As the Supreme Court recognized in its test of "appreciable harm" by definition involves a resolution of disputed facts and thereby precludes the use of summary judgment or demurrer to determine the availability of the limitations defense. The case before us proves the point.

By comparison, application of the rule we believe the Legislature intended is simple and certain -- Laird was actually damaged on the day the order of dismissal was entered October 20, 1981. On that date, Laird knew her case had

been dismissed, and also knew that her attorney's negligence was the cause of the dismissal. The period of limitations therefore started running on the date she discharged her attorneys, December 7, 1981. Laird nevertheless waited until May 17, 1983, to file suit, five months too long. Since these dates are all subject to judicial notice (Evid. Code section 452, subd. (d)), the issue could have been resolved by demurrer or motion for summary judgment in our view, this factor speaks loudly in favor of the rule.

We therefore hold that the concepts of "appreciable harm" and "irremediable" damage did not survive the adoption of section 340.6 and that the "actual injury contemplated by subdivision (a)(1) of section 340.6 is injury which is existing and not feigned or merely speculative, real and not imagined, objectively

verifiable and not dependent upon the subjective description of the injured person. Accordingly, where an attorney's wrongful act or omission occurs in the course of representing a client in litigation and the client suffers an adverse judgment or other final order in the underlying case, the tolling period of subdivision (a)(1) of section 340.6 stops, at the latest as of the date of the adverse judgment or order and without regard to whether an appeal is filed or pursued.

Since no other tolling provision applies to this case, we hold that Laird's action against Post and Winnikoff is barred by limitations and that the attorneys are entitled, as a matter of law, to judgment in their favor. While we doubt that it will comfort Laird, we express our hope that application of the

rule we apply to her case will in the future prevent the prolonged battle she had to fight only to suffer reversal of a verdict in her favor. This case should have been resolved on demurrer.[23]

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[23] We have considered the effect of the rule of this case on Heyer, Budd, Southland, Bell, Robinson and Troche and note that in each case, although our analysis differs, the result would be the same. In Heyer, subdivision (b) of section 340.6 would make the daughters' action timely. In Budd, the statute would run from the date of entry of judgment against Mr. Budd. In Southland, the statute would run from the date of the administrative decision (not the day following the last day to appeal, but the 30-day difference would not have made the action timely). In Bell, the statute would run from the date of the order refusing her husband's application to join in the underlying case as a plaintiff. In Troche, the statute would run from the date Ms. Troche's federal action was dismissed.

And despite our criticism of Robinson's analysis, our result would be the same. In Robinson, all of the attorney's negligence involved advice unrelated to litigation and the dispute reached both the administrative and

DISPOSITION

The judgment is reversed and remanded with directions to enter a new and different judgment, against Laird and in favor of Post and Winnikoff. The parties are to pay their own costs on appeal.

VOGEL, J

We concur:
DEVICH, Acting P.J.
ORTEGA, J.

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judicial tribunals because Mr. Robinson's new attorney sought a writ of mandate from the trial court to compel an administrative determination of Mr. Robinson's employment status. Thus, the first date on which Mr. Robinson's injury became real and objectively verifiable was on July 18, 1980, the date on which the trial court (1) ruled that Mr. Robinson had resigned and (2) ordered the city to hold a hearing to determine Mr. Robinson's right to disability benefits. His malpractice action, filed on April 30, 1980 was therefore timely.

APPENDIX C

ORDER DENYING REHEARING

2/1 B037429 - S021074

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

JERI EMMET LAIRD, Respondent

v.

SIDNEY BLACKER, Appellant

Petition for rehearing DENIED.
Mosk, J. is of the opinion the petition should be granted.
Opinion modified.

(Sgd) Lucas
Chief Justice